

NO. 45228-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

GERALD YANAC,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeanette Dalton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's conclusion that appellant threatened the immediate use of force while demanding money from a teller inside a financial institution is not supported by the evidence.

2. The trial court's conclusion that appellant's implied threat forced the teller to comply with his demands for money is not supported by the evidence.

2. The State failed to prove the essential elements of first degree robbery beyond a reasonable doubt.

Issues pertaining to assignments of error

Where there was no evidence that appellant communicated, either directly or indirectly, an intent to use immediate force, violence, or fear of injury, must his conviction for first degree robbery be reversed?

B. STATEMENT OF THE CASE

1. Procedural History

On September 18, 2012, the Kitsap County Prosecuting Attorney charged appellant Gerald Yanac with possession of a stolen vehicle and first degree robbery. CP 1-5; RCW 9A.56.068; RCW 9A.56.190; RCW 9A.56.200(1)(b). The State later added a charge of first degree theft. CP 16-19; RCW 9A.56.020(1)(a); RCW 9A.56.030(1)(b). Yanac waived his

right to a jury trial and submitted stipulated facts and evidence for the court's verdict. CP 20-114. The Honorable Jeanette Dalton found Yanac guilty of possession of a stolen vehicle and first degree robbery and dismissed the charge of first degree theft. CP 115-18, 119-20. The court entered a standard range sentence, and Yanac filed this timely appeal. CP 123-24, 132.

2. Substantive Facts

On August 15, 2012, Gerald Yanac entered the Port Orchard branch of Key Bank. It was 86 degrees and sunny, and he was wearing a short sleeved polo shirt, a baseball cap, and sunglasses. CP 20, 110-14. Yanac walked directly to teller Kathe Hoag's window and held out an empty plastic grocery bag. CP 21. He said, "Money." Hoag asked, "Money?" and Yanac repeated, "Money." CP 21, 30. Hoag placed some of the smaller bills from her drawer in the bag. CP 30. Yanac said, "More." Hoag then placed a few more bills in the bag and told Yanac, "That's it." CP 30. Yanac took the bag and left without saying another word. CP 21.

There are two silent alarm triggers a teller can activate under these circumstances, but Hoag did not activate either of them. CP 57. Although bank policy is to do whatever a robber asks, Hoag also made the decision not to give Yanac all the money in her drawer. CP 51, 103. Just before

Yanac came into the bank Hoag had taken deposits from a couple of merchants. There was still a large amount of cash in her drawer from those transactions, which she did not want Yanac to have. CP 51. A set of marked twenty dollar bills, used to trace money stolen from the bank, is stored at the bottom of the stack of twenties. Because Hoag did not give Yanac all her twenties, she did not give him the bait money. CP 51, 58. Hoag gave Yanac a total of \$505. CP 70.

As Yanac walked out of the bank, Hoag told her manager to lock the door. The manager asked if she had been robbed, and Hoag said yes. CP 84. Hoag called 911 while the manager watched Yanac get into a truck and drive away. CP 61, 84. At that point Hoag got scared for a moment, because she thought Yanac might have heard her tell her manager to lock the door. CP 61.

Yanac was arrested a short time later near a truck that had been reported stolen. CP 21. All but \$100 of the money taken from the bank was recovered. CP 33, 70.

Hoag reported to police that there was no mention of a weapon and no threats other than the demand for money. CP 30. She stated in her interview with the prosecutor and defense attorney that she never saw any weapons, Yanac never did anything to give the impression that he had a

weapon, and at no point did she believe he had a weapon. CP 62-63. Moreover, Yanac never said anything to threaten her. CP 64.

In her written statement made shortly after the incident, Hoag said she had noticed Yanac approaching the bank from outside and believed he looked suspicious. She was about to ask him to remove his sunglasses when he placed the plastic bag on the counter. CP 50. Hoag said in her interview that as she saw Yanac walk toward the bank, she was expecting “it.” CP 60. He was kind of fidgety when he walked inside wearing his sunglasses, and he walked straight to her window. CP 60. She did not recognize Yanac as a regular customer, and he looked like he was on drugs. CP 62-63.

When asked if she felt threatened, Hoag said she felt like she was in shock, she did not know how to respond, she was shaky, and she reacted automatically. CP 64-65. She said she gave Yanac the money because she felt like she needed to give it to him or he might do something to hurt her. CP 65. That feeling came from Yanac’s tone of authority, and Hoag did not want to find out what would happen if she did not comply. CP 65. Yanac did not communicate a threat verbally, or with his hands, or in any other manner. CP 70. Hoag stated that if Yanac had shown a weapon, or passed a note saying he had a weapon, or communicated any

kind of threat at all, she would not have given him just the small amount of cash she gave him; she would have given him what he wanted. CP 77.

C. ARGUMENT

THE STATE FAILED TO PROVE THAT YANAC THREATENED TO USE IMMEDIATE FORCE, VIOLENCE, OR FEAR OF INJURY, AND HIS ROBBERY CONVICTION MUST BE REVERSED.

For a criminal conviction to be upheld, the State must prove every element of the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Walton, 64 Wn. App. 410, 415, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). But, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

A person is guilty of first degree robbery as charged in this case when he “unlawfully takes personal property from the person of another ... against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person ...” and the robbery is committed within and against a financial institution. RCW 9A.56.190; RCW 9A.56.200(1)(b). In this case there is no evidence that Yanac used or threatened to use immediate force, violence, or fear of injury.

A challenge to the sufficiency of the evidence presented at a bench trial requires the appellate court to determine whether substantial evidence supports the trial court’s findings of fact and whether those findings support the trial court’s conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Here, the trial court’s findings were based on undisputed facts. The court found that Yanac demanded “Money” and “More” and that Hoag was nervous and intimidated and felt she needed to comply to avoid harm to herself and others. CP 116. Those facts do not support the conclusion that Yanac threatened any force, violence, or fear of injury, however. CP 117-18.

Washington courts have recognized that robbery encompasses any taking of property that is “attended with such circumstances of terror, or such threatening by menace, word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with

property for the safety of his person.” State v. Redmond, 122 Wash. 392, 393, 210 P. 772 (1922); State v. Shcherenkov, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008), review denied, 165 Wn.2d 1037 (2009). “Any ... threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction.” State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992).

This Court has held that the threat required by the statutory definition of robbery may be either express or implied. Shcherenkov, 146 Wn. App. at 625-26. Division One of the Court of Appeals has gone further, stating that “[n]o matter how calmly expressed, an unequivocal demand for the immediate surrender of the bank's money, unsupported by even the pretext of any lawful entitlement to the funds, is fraught with the implicit threat to use force.” State v. Collinsworth, 90 Wn. App. 546, 553, 966 P.2d 905 (1997), review denied, 135 Wn.2d 1002 (1998). This language in Collinsworth would apparently make any demand for money within a financial institution a robbery. This Court has not adopted or endorsed the Collinsworth statement, recognizing that the State must persuade the trier of fact “that the defendant communicated, directly or indirectly, the intent to use immediate force beyond a reasonable doubt.” Shcherenkov, 146 Wn. App. at 628 (citing RCW 9A.56.190; RCW

9A.04.110(27)). Thus, the issue is whether the demand for money used a threat of immediate force as an inducement to comply. Id. at 628.

This Court found sufficient evidence to sustain Shcherenkov's convictions on four counts of first degree robbery of a financial institution. At three of the banks Shcherenkov showed tellers notes explicitly saying "this is a robbery." Shcherenkov, 146 Wn. App. at 622-23. The threat element was established as to these incidents "because robbery inherently involves a threat of immediate force." Id. at 629. In the fourth bank Shcherenkov showed the teller a note demanding money and saying not to make any sudden movements because "I will be watching you." Shcherenkov, 146 Wn. App. at 622-23. This Court concluded that any rational trier of fact would interpret Shcherenkov's statement as indirect communication that he would use force if the teller did not comply. Id. at 629.

The facts here do not support a conclusion that Yanac threatened Hoag, because he never communicated, directly or indirectly, that he would use force if she did not comply. Unlike Shcherenkov, Yanac never told Hoag that this was a robbery. He simply said, "Money," and "More." Hoag stated that Yanac used a tone of authority when he said "Money," and she did not want to find out what would happen if she did not comply. But this tone of authority was not sufficient to constitute a threat, because

Yanac did not communicate any intent to use immediate force, violence or fear of injury using that tone.

Hoag's speculation that something bad might happen was not the result of a threat. Hoag herself stated that Yanac communicated no threat, either verbally or nonverbally. CP 70. If he had communicated any kind of threat, she would have given him all the money in her drawer. But she did not. She gave him a small amount of money so that he would go away, which he did. CP 77.


The State failed to prove beyond a reasonable doubt that Yanac threatened the use of immediate force, violence, or fear of injury. Yanac's robbery conviction must therefore be reversed.

D. CONCLUSION

The State failed to prove the threat element of first degree robbery beyond a reasonable doubt, and Yanac's conviction must be reversed.

DATED January 27, 2014.

Respectfully submitted,



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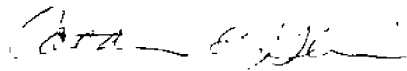
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Connell, WA 99326

I certify under penalty of perjury of the laws of the State of Washington
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Catherine E. Glinski
Done in Port Orchard, WA
January 27, 2014

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